

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff(s),

v.

LEON BENZER, et al.,

Defendant(s).

Case No. 2:13-CR-18 JCM (GWF)

ORDER

Presently before the court is Leon Benzer's ("defendant") emergency motion for compassionate release (ECF No. 917), which counsel supplemented (ECF No. 919). The United States of America ("the government") filed a response (ECF No. 921), to which defendant replied (ECF No. 923).

I. Background

As relevant to this motion, the court originally sentenced defendant to 188 months' incarceration on April 10, 2019, for orchestrating a homeowners'-association-take-over conspiracy that resulted in more than \$12 million in losses to its victims. (ECF Nos. 729; 750). After defendant's appeal (ECF No. 747), the court resentenced him to a total of 151 months' incarceration (ECF No. 860; 862). While defendant has been incarcerated, the novel strain of coronavirus and COVID-19, the resultant respiratory disease, have run rampant throughout the country and the world. While the court need not reiterate the well-known effects COVID-19 has had on day-to-day life, certain populations are particularly at risk of "severe illness" from the virus:

1 the elderly, asthmatic, immunodeficient, and people with HIV. *See* Center for Disease Control,
 2 *People Who Are at Higher Risk for Severe Illness*, (June 9, 2020).¹

3 The CDC’s list of at-risk persons has expanded, and new studies on COVID-19 vis-à-vis
 4 comorbidities continue to be promulgated. *Id.*; *see also, e.g.*, Xianxian Zhao, et al., *Incidence,*
 5 *clinical characteristics and prognostic factor of patients with COVID-19: a systematic review and*
 6 *meta-analysis* (March 20, 2020);² Safiya Richardson, et al., *Presenting Characteristics,*
 7 *Comorbidities, and Outcomes Among 5700 Patients Hospitalized With COVID-19 in the New York*
 8 *City Area* (April 22, 2020).³

9 Defendant moves this court for compassionate release, arguing that his underlying medical
 10 conditions—chronic obstructive pulmonary disease (“COPD”), pulmonary hypertension, high
 11 blood pressure, and type two diabetes—make him more susceptible to COVID-19. (ECF No. 100).
 12 In his reply brief, defendant indicates he has asthma. (*See generally* ECF No. 104).

13 While the government acknowledges that defendant has exhausted his administrative
 14 remedies, as required by the First Step Act, 18 U.S.C. § 3582(c)(1)(A), it argues that the court
 15 should deny the motion because, in light of his age, his conditions do not substantially diminish
 16 his ability to provide self-care within the environment of a correctional facility. (ECF No. 103 at
 17 4–8, 10–11). The government further argues that the § 3553(a) sentencing factors weight against
 18 compassionate release. *Id.* at 11–13.

19 **II. Legal Standard**

20 “Even though courts ordinarily have the inherent authority to reconsider its prior orders,
 21 such authority does not exist when there is an ‘express rule to the contrary.’” *United States v.*
 22 *Barragan-Mendoza*, 174 F.3d 1024, 1028 (9th Cir. 1999). One such contrary rule is relevant here:
 23 “A court generally may not correct or modify a prison sentence once it has been imposed.” *United*

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 26 ¹ Available at [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html)
[precautions/people-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html).

27 ² Available at <https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.full.pdf>. at

28 ³ Available at <https://jamanetwork.com/journals/jama/fullarticle/2765184>.

1 *States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (citing 18 U.S.C. § 3582(c)). Instead, the court
2 may modify a sentence only when expressly authorized by statute.

3 The court is expressly authorized to modify a sentence under the compassionate release
4 provision of 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, Pub. L. No. 115-391,
5 132 Stat. 5194 (Dec. 21, 2018). 18 U.S.C. § 3582(c)(1)(A). However, courts may consider
6 compassionate release only “upon motion of the Director of the Bureau of Prisons” *Id.* If a
7 defendant wants to file such a motion with the court, he must fully exhaust his administrative
8 remedies before doing so. *Id.* Since the enactment of the First Step Act, a defendant may file a
9 compassionate-release motion if his application to the BOP goes unanswered for thirty days. *Id.*

10 To be eligible for compassionate release, a defendant must demonstrate: (1) the existence
11 of extraordinary and compelling reasons, and (2) that he is not a danger to the community. 18
12 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13. Under USSG § 1B1.13, “extraordinary and compelling
13 reasons” include, amongst other things, terminal illnesses and medical conditions “that
14 substantially diminishes the ability of the defendant to provide self-care within the environment of
15 a correctional facility and from which he or she is not expected to recover.” USSG § 1B1.13.

16 **III. Discussion**

17 The parties extensively brief whether the 30-day BOP-exhaustion requirement is
18 jurisdictional or simply a claims-processing rule. (*See* ECF Nos. 919; 921; 923). The court need
19 not reach this issue, as the parties agree that defendant’s 30-day period ended on June 13. (ECF
20 Nos. 919 at 6; 921 at 8).

21 The court need only consider whether there are extraordinary and compelling reasons that
22 justify compassionate release. If there are, the court also considers the sentencing factors under
23 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3582(c)(1)(A) (allowing the court to order compassionate
24 release only “after considering the factors set forth in section 3553(a) to the extent that they are
25 applicable”).

26 Defendant contends his chronic conditions—diabetes, hypertension, and obesity—warrant
27 immediate release from custody. (ECF No. 919 at 21–22).

1 The court acknowledges the significant public policy implications of feely granting home
 2 confinement to any inmate who expresses a fear of contracting COVID-19. Such a position is
 3 untenable because each and every inmate rightfully fears contracting COVID-19—just as each and
 4 every American does when he or she must venture from their homes. However, the court also
 5 acknowledges that the fear of COVID-19 in the penological context is justifiably acute. This
 6 requires the court to, as best it can, strike a delicate balance. Indeed, this very balance is why the
 7 BOP is ordinarily given the first opportunity to review an inmate’s request for compassionate
 8 release.

9 While the court understands defendant’s concern regarding COVID-19, the court does not
 10 find that defendant’s preexisting medical conditions are sufficiently “extraordinary or compelling”
 11 such that compassionate release is immediately necessary. Defendant’s conditions are ubiquitous
 12 in society such that release in this case risks opening the compassionate-release floodgates.

13 On an individual level, defendant has not shown that these conditions are so severe or
 14 unattended while incarcerated to pose a risk that is any more imminent than that which the country
 15 at large faces. To the contrary, the government notes that defendant’s age (53) does not put him
 16 at risk of contracting COVID-19 and that “medical staff have evaluated him and found his
 17 underlying conditions to be ‘under control.’” (ECF No. 921 at 20). The medical department at
 18 defendant’s facility is aware of defendant’s conditions and advises that they are “currently well
 19 controlled and will continue to be managed and monitored.” *Id.* at 21. Thus, the court finds that
 20 defendant’s medical conditions do not “substantially diminish[] [his] ability . . . to provide self-
 21 care within the environment of a correctional facility”⁴ See USSG § 1B1.13.

22 Further, the court also considers the sentencing factors in § 3553(a). These include, *inter*
 23 *alia*, “the nature and circumstances of the offense and the history and characteristics of the
 24 defendant”; “the need for the sentence imposed to reflect the seriousness of the offense, to promote
 25 respect for the law, and to provide just punishment for the offense”; and “the need to avoid
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 28 ⁴ This conclusion is further supported by the government’s unrefuted representation that
 there are no confirmed cases of COVID-19 in defendant’s facility. (ECF No. 921 at 15–17).

unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. §§ 3553(a)(1), (2)(A), (6).

The court also finds that the § 3553(a) do not support compassionate release. Defendant has served only served 54 months of his 151-month sentence. The sentence is appropriate to reflect the severity of his fraud scheme, which cost its victims in excess of \$12 million, and its attendant conduct:

Benzer led and recruited more than thirty-five people—taking advantage of his family members, girlfriends, and friends that were vulnerable and down on their luck—into a scheme where he was the only one to receive millions of dollars that they stole from victim homeowners. Benzer committed these crimes just so that he could spend money lavishly on himself. Benzer and his co-conspirators did not just defraud homeowners, they terrorized them. Benzer hired men to bring guns to a HOA meeting in order to intimidate the homeowners. Benzer hired attorneys and police officers to harass homeowners. Benzer and his co-conspirators took over three HOAs, drained Vistana of its funds, and positioned themselves to takeover many more HOAs. The only thing that stopped them was the FBI.

(ECF No. 921 at 21–22).

Because defendant’s conditions are well managed and under control while incarcerated and the § 3553(a) factors cut against compassionate release, the court denies defendant’s motion.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant’s emergency motion for compassionate release (ECF Nos. 917; 919) be, and the same hereby is, DENIED.

DATED June 15, 2020.


UNITED STATES DISTRICT JUDGE